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RHB Bank Bhd v Seni Maju Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D22–27 OF 2006
MARY LIM J
19 JULY 2012

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Banking — Guarantee — Liability — Banking facilities — Default of payment Guarantors — Guarantors came in at different points in time — Whether guarantors obliged to answer for default

D

Civil Procedure — Pleadings — Defects in pleadings — Banking — Merge and consolidation — Securities not pleaded — No correlation between accounts held and three new accounts — How accounts migrated, not explained — No records of how accounts arose — Whether mergence of various accounts without prior notification a prejudice

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The first defendant was granted various banking facilities by the first bank which was then known as Development & Commercial Bank Bhd ('D&C Bank'). On 17 December 1994, D&C Bank changed its names to DCB Bank Bhd ('D&C Bank'). The facilities were then renewed to be in accordance with the terms and conditions of the offer letter. On 1 July 1997, DCB Bank changed its name to RHB Bank Bhd. Between 1995–2002, the first defendant took out several other facilities with the second bank, Bank Utama (M) Bhd ('Bank Utama'). On 8 April 2003, all businesses, assets and liabilities of Bank Utama were vested in RHB Bank Bhd, the plaintiff, through a vesting order of even date. The first defendant's facility with RHB Bank was revised pursuant to the former's request and the drawing limit of the overdraft was then increased. In all the facility arrangements, there were terms and conditions concerning the imposition, variation and calculation of interest rates. There were also terms providing for the preparation and reliance on statement of accounts as final and conclusive proof of the first defendant's indebtedness; and the service of notices or demands. All letters of offer and related documents were to be read to accord the terms of the vesting order. The guarantors of the facilities came in at different points in time. All the facilities were disbursed to and utilised by the first defendant. However, the first defendant defaulted in its monthly payment and was issued a letter of demand on 29 September 2005. The demand proved to be futile as there was no settlement. The plaintiff went on to terminate and recall all the facilities as well as demanded the settlement of all outstanding sums together with interests. The defendants averred that the pleadings were defective and that the securities had not been fully pleaded. It was also their contention that the merging or consolidation of the various accounts without

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prior notification to the first defendant had prejudiced the first defendant. In addition to that, there was also no full accounting to the first defendant of the accounts opened. Therefore, it was contended that the plaintiff had fail to prove its case. The defendants who were guarantors contended that they could not be liable for all the facilities as it was stressed that the plaintiff cannot merge or consolidate the facilities by virtue of the events that took place within the plaintiff's corporate sole and affairs. The plaintiffs, relying on s 26(3) of the Companies Act 1965 ('Act') argued that it was entitled to launch its claim as the facilities were all taken by the same plaintiff, which was the plaintiff. It further argued that the vesting order pursuant to s 50(3) of the Banking and Financial Institutions Act 1989 ('BAFIA') conferred it with this right. The issues to be determined by the court were whether the statement of claim was defective; whether the sum claimed was proven and the liabilities of the guarantors.

Held, allowing plaintiff's claim:

(1) Although s 23(6) of the Act gave the plaintiff the right to sue, be it under its old or new name, it did not being about the effect or conclusions suggested by the plaintiff. Persons who were affected by the vesting order were bound even if they did not participate or had no notice of the proceedings related to the vesting order. An order made under s 50(3) of the BAFIA had the full effect according to its terms. The effect of the vesting order was that it allowed successor bank to be a party to the transactions regardless of the usual prohibitions. If there were proceedings, the successor would just carry on where the predecessor left. The vesting order bound the defendants regardless of whether any of them had been notified of the related proceedings (see paras 45–47 & 51).

(2) The proposition which formed the basis of the plaintiff's claim was flawed. While banks may amalgamate, change names, downsize and merge with others, such corporate exercises were well and good but it did not mean that they can start to create client's obligations where there were none before. Further the vesting order only meant that the rights, liabilities and benefits enjoyed by Bank Utama were transmitted to RHB. It did not confer upon the plaintiff the right to amalgamate both facilities with the two banks to make the defendants liable for both as if the facilities were a single facility (see paras 54 & 65).

(3) Even though the plaintiff, as a banking institution must maintain and observe compliance and accounting procedures compatible and in keeping with international stands, there was no necessity to plead the whole history of transactions and arrangements and neither was there any requirement to plead the minutiae of the operations of the contract in question. Since the present claim was founded on a breach of contract, it was fundamental that the plaintiff pleaded the necessaries to prove its

claim and this have been met in the statement of claim. The matters alluded by the defendants did not violate the fundamentals of pleading. The validity of the claim was not affected as long as the plaintiff was able to prove its claim (see paras 72–73).

(4) The plaintiff's claim was proven. The plaintiff's witnesses had competently and confidently explained their calculations of the various principal sums and interests; and how the accounts were kept. These sums were specified in the notices of demand issued to the defendants. There were no protests, queries or clarifications sought. On the totality of evidence, the defendants themselves must have been satisfied with the accuracy of the sum claimed (see para 137).

(5) The first defendant was liable and remained liable for the total sum as represented in the three accounts pleaded and testified by the plaintiff's witnesses regardless of the identity of the original lending bank. As guarantors and consistent with the respective contracts of guarantees, and as provided under s 79 of the Contracts Act 1950, the defendants were obliged to answer for the first defendant's default. The seventh defendant, too, remained bound and liable as it was evident that he was well aware of the matters when joined the first defendant and when he agreed to be a guarantor (see paras 142–143).

(6) The second, third, forth and fifth defendants were liable for the sum due under the DCB Bank facilities as reflected in the first two accounts. Other than the third defendant these defendants together with the seventh, eighth and ninth defendants were liable for the sum due under the Bank Utama facilities as reflected in the third account. The third defendant was also liable for the sum due under the Bank Utama facilities as reflected in the third account, together with interest as pleaded but up to the limit as stipulated in the fifth guarantee (see para 178).

[Bahasa Malaysia summary

Defendan pertama telah diberikan pelbagai kemudahan perbankan oleh bank pertama yang ketika itu dikenali sebagai Development & Commerial Bank Bhd ('D&C Bank') Pada 17 Disember 1994, D&C Bank menukar namanya kepada DCB Bank Bhd ('D&C Bank'). Kemudahan-kemudahan tersebut diperbaharui menurut terma dan syarat dalam surat tawaran. Pada 1 Julai 1997, DCB Bank menukar namanya kepada RHB Bank Bhd. Antara tahun 1995–2002, defendan pertama mengambil beberapa kemudahan lain dengan bank kedua, Bank Utama (M) Bhd ('Bank Utama'). Pada 8 April 2003, semua perniagaan, aset dan liabiliti Bank Utama telah diberihak kepada RHB Bank Bhd, plaintif melalui perintah pemberian hak pada tarikh tersebut. Kemudahan defendan pertama dengan RHB Bank disemak menurut permintaan defendan dan had pengeluaran overdraf kemudian dinaikkan. Dalam semua urusan kemudahan, terdapat terma dan syarat berkaitan

pengenaan, pengubahan dan pengiraan kadar faedah. Terdapat juga terma memperuntukkan penyediaan dan penggunaan penyataan akaun-akaun sebagai bukti akhir dan muktamad berhubung keberhutangan defendan pertama; dan penyampaian notis-notis tuntutan. Semua surat tawaran dan dokumen-dokumen berkaitan hendaklah dibaca menurut terma-terma perintah pemberian hak. Penjamin-penjamin kemudahan-kemudahan tersebut wujud dalam masa berbeza. Semua kemudahan tersebut dibayar kepada dan digunakan oleh defendan pertama. Walau bagaimanapun, defendan pertama telah gagal dalam bayaran bulanannya dan telah diberikan surat tuntutan pada 29 September 2005. Tuntutan tersebut ternyata sia-sia kerana tidak mencapai apa-apa penyelesaian. Plaintif kemudian telah menamatkan dan menarik balik semua kemudahan dan juga menuntut penyelesaian untuk semua jumlah terhutang beserta faedah. Defendan-defendan menegaskan bahawa pliding tersebut adalah defektif dan bahawa cagaran-cagaran tersebut tidak diplid sepenuhnya. Adalah hujah mereka juga bahawa penggabungan atau penyatuan pelbagai akaun-akaun tanpa pemberitahuan terdahulu kepada defendan pertama telah menprejudiskan defendan pertama. Tambahan pula, tiada perakaunan penuh kepada defendan pertama berhubung akaun-akaun yang dibuka. Oleh itu, adalah dihujahkan bahawa plaintif telah gagal membuktikan kesnya. Defendan-defendan yang merupakan penjamin-penjamin berhujah bahawa mereka tidak boleh dipertanggungjawabkan untuk semua kemudahan tersebut kerana menegaskan bahawa plaintif tidak boleh menggabung atau menyatukan kemudahan-kemudahan tersebut menurut kejadian yang berlaku dalam urusan dan kedudukan korporat plaintif. Plaintif-plaintif, bergantung kepada s 26(3) Akta Syarikat 1965 ('Akta') berhujah bahawa ia berhak memulakan tuntutannya kerana kemudahan-kemudahan tersebut semuanya diambil oleh plaintif yang sama, iaitu plaintif. Adalah dihujah lagi bahawa perintah pemberian hak menurut s 50(3) Akta Institusi Perbankan dan Kewangan 1989 ('BAFIA') memberikannya hak ini. Isu-isu untuk ditentukan adalah sama ada penyataan tuntutan tersebut defektif; sama ada jumlah yang dituntut telah dibuktikan dan liabiliti-liabiliti penjamin-penjamin.

Diputuskan, membenarkan tuntutan plaintif:

(1) Walaupun s 23(6) Akta memberikan plaintif hak untuk menyaman, sama ada di bawah nama lama atau barunya, ia tidak memberi kesan atau kesimpulan yang dicadangkan oleh plaintif. Individu yang terjejas dengan perintah pemberian hak tersebut terikat meskipun mereka tidak terlibat atau tiada notis prosiding berkaitan perintah pemberian hak tersebut. Suatu perintah dibuat di bawah s 50(3) BAFIA mempunyai kesan sepenuhnya menurut terma-termanya. Kesan perintah pemberian hak adalah di mana ia membenarkan bank pengganti menjadi satu pihak kepada transaksi meskipun terdapat larangan-larangan. Jika terdapat prosiding, pengganti hanya perlu meneruskan sahaja apa yang

ditinggalkan oleh orang terdahulu. Perintah pemberian hak mengikat defendan-defendan tanpa mengira sama ada antara mereka telah pun diberitahu berkaitan prosiding berkaitan (lihat perenggan 45–47 & 51).

(2) Cadangan yng membentuk asas tuntutan plaintif adalah cacat. Di mana bank-bank boleh disatukan, menukar nama, mengecilkan saiz dan bergabung dengan yang lain, amalan korporat sedemikian adalah teratur dan baik tetapi ini tidak bermaksud bahawa mereka boleh mula membentuk obligasi pelanggan yang tiada sebelum ini. Bahkan perintah pemberian hak hanya bermaksud bahawa hak, liabiliti dan faedah yang dinikmati oleh Bank Utama telah dipindahkan kepada RHB. Ia tidak memberikan plaintif hak untuk menyatukan kedua-dua kemudahan dengan dua bank tersebut untuk menjadikan defendan-defendan bertanggungjawab untuk kedua-duanya seperti mana kemudahan-kemudahan itu dianggap sebagai satu kemudahan (lihat perenggan 54 & 65).

(3) Walaupun plaintif, sebagai institusi bank perlu mengekal dan meneliti pematuhan dan prosedur perakaunan adalah bersesuaian dan mengekalkan pendirian antarabangsa, tiada keperluan untuk memplid seluruh latar belakang transaksi dan urusan dan juga tiada apa-apa keperuan untuk memplid secara terperinci operasi kontrak yang dipersoalkan. Oleh kerana tuntutan ini berasaskan pelanggaran kontrak, adalah penting agar plaintif memplid keperluan-keperluan tersebut untuk membuktikan tuntutannya dan ini telah pun dibuat di dalam penyataan tuntutan. Perkara-perkara yang dinyatakan oleh defendan-defendan tidak melanggar asas pliding tersebut. Keesahan tuntutan tidak menjejaskan selagi plaintif boleh membuktikan tuntutannya (lihat perenggan 72–73).

(4) Tuntutan plaintif telah dibuktikan. Saksi-saksi plaintif adalah kompeten dan menjelaskan dengan yakin pengiraan pelbagai jumlah prinsipal dan faedah; dan bagaimana akaun disimpan. Jumlah-jumlah tersebut dinyatakan dalam notis-notis tuntutan yang diberikan kepada defendan-defendan. Tiada bantahan, soalan atau penjelasan diminta. Pada keseluruhan keterangan, defendan-defendan sendiri semestinya telah berpuas hati dengan ketepatan jumlah yang dituntut (lihat perenggan 137).

(5) Defendan pertama bertanggungjawab dan kekal bertanggungjawab untuk semua jumlah yang dikemukakan dalam tiga akaun yang telah diplid dan diberi keterangan oleh saksi-saksi plaintif tanpa mengira identiti bank peminjam asal. Sebagai penjamin-penjamin dan konsisten dengan kontrak-kontrak penjamin-penjamin berkaitan, dan sebagaimana diperuntukkan di bawah s 79 Akta Kontrak 1950, defendan-defendan bertanggungjawab untuk menjawab kegagalan defendan pertama. Defendan ketujuh, juga tetap terikat dan

bertanggungjawab kerana adalah nyata bahawa dia menyedari perkara-perkara tersebut apabila bekerja dengan defendan pertama dan apabila dia bersetuju menjadi penjamin (lihat perenggan 142–143).

(6) Defendan-defendan kedua, ketiga, keempat dan kelima bertanggungjawab untuk jumlah yang perlu dibayar di bawah kemudahan-kemudahan DCB Bank sebagaimana ditunjukkan dalam dua akaun pertama tersebut. Selain daripada defendan ketiga, defendan-defendan tersebut bersama dengan defendan-defendan ketujuh, kelapan dan kesembilan bertanggungjawab untuk jumlah yang perlu dibayar di bawah kemudahan-kemudahan Bank Utama sebagaimana ditunjukkan dalam akaun ketiga. Defendan ketiga juga bertanggungjawab untuk jumlah yang perlu dibayar di bawah kemudahan-kemudahan Bank Utama sebagaimana ditunjukkan dalam akaun tiga, bersama dengan faedah seperti mana yang diplid tetapi sehingga had yang ditetapkan dalam jaminan kelima (lihat perenggan 178).]

Notes

For cases on defects in pleading, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5936–5942.

Cases referred to

Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd [2007] 4 MLJ 209; [2007] 4 CLJ 109, CA (refd)

Algemene Bank Nederland NV v Kace Advertising Sdn Bhd & Ors [1989] 3 MLJ 506; [1989] 1 CLJ (Rep) 293, HC (refd)

Allied Granite Marble Industries Sdn Bhd v Chin Foong Holdings Sdn Bhd [2000] 5 CLJ 71, HC (refd)

ASM Metal Sdn Bhd v Malayan Banking Bhd (by vesting order dated 22 December 2000 assets and liabilities owned by The Pacific Bank Bhd taken over by Malayan Banking Bhd with effect on and from 1 January 2001) [2011] 3 MLJ 317, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Cambridge Credit Corpn v Lambard Australia Ltd (1977) 136 CLR 608, HC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading & Anor) [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd [2004] 4 MLJ 453; [2004] 3 CLJ 436, CA (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Hong Leong Bank Bhd v Bennes Machinery Sdn Bhd & Ors [2009] MLJU 1344, HC (refd)

Kawood Sdn Bhd v HSBC Bank Malaysia Bhd & Ors [2001] MLJU 650, HC (refd)
Khor Kok Kwing v The Co-operative Central Bank Ltd (Civil Appeal No W-03–31 of 2004) (refd)
Kumaran Sappani v PP [2011] 3 CLJ 251, FC (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, SC (refd)
Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors [1997] 2 MLJ 614; [1997] 2 CLJ 131, CA (refd)
Mahoney v McManus (1981) 36 ALR 545; (1981) 55 ALJR 673, HC (refd)
Melewar Leisure Sdn Bhd v Danaharta Managers Sdn Bhd [2010] 6 MLJ 317; [2011] 1 CLJ 857, CA (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577; [1995] 2 CLJ 23, FC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293; [2009] 6 CLJ 430, FC (refd)
Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd [2009] 3 MLJ 745; [2009] 2 CLJ 630, FC (refd)
Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401; [1995] 1 CLJ 761, FC (refd)
Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd [1991] 3 CLJ (Rep) 451, HC (refd)
Pledge v White [1896] AC 187, HL (refd)
Pusat Bandar Damansara Sdn Bhd v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513; [2000] 1 CLJ 346, CA (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp [2009] 2 MLJ 765; [2009] 3 CLJ 10, CA (refd)
Sistem Penyuraian Trafik KL Barat Sdn Bhd v Kenny Heights Development Sdn Bhd & Anor [2009] 3 MLJ 809; [2009] 4 CLJ 57, CA (refd)
Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd [2004] 6 CLJ 320, HC (refd)
Tan Chong Keat v Pengurusan Danaharta Nasional Berhad [2008] MLJU 289; [2008] 4 CLJ 748, CA (refd)
Tararone Investments Pte Ltd; Development Bank of Singapore Ltd v Ong Yew Huat & Ors (Judicial managers of Tararone Investments Pte Ltd, jointly and severally), Re [2001] 4 SLR 167, CA (refd)
United Malayan Banking Corporation Berhad v Palm Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206; [1982] CLJ (Rep) 358, FC (distd)
Yoong Sze Fatt v Pengkalen Securities [2010] 1 MLJ 85; [2010] 1 CLJ 484, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50, 50(3)
Companies Act 1965 ss 23(6), 26(3)
Contracts Act 1950 s 79

Evidence Act 1950 s 114(g)
National Land Code Form 16D
Rules of the High Court 1980 O 15 r 7(2)

Bahari Yeow (Conrad Lopez with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
KS Lam (KS Lam & Co) for the first defendant.
David Samuel (Chambers of Firdaus) for the second, third, fourth, fifth, eigth and ninth defendants.
Surinjit Sidhu (Marshita Surin & Associates) for the seventh defendant.

Mary Lim J:

A TALE OF TWO BANKS

[1] First, there were two banks. Then, there was one. Over the course of some ten odd years, the first defendant entered into arrangements for various banking facilities with the two banks at different points in time. The second to the ninth defendants stood as guarantors of the various banking facilities. The first set of banking facilities will be referred to as 'the DCB facilities' while the second set will be referred to as 'the BU facilities'.

[2] The single bank now claims for all the banking facilities that the first defendant took with the two banks. The challenge faced by the parties and the court here is to unravel all those arrangements before the respective defendants' liabilities, if any, can be determined. These are material facts.

THE FIRST BANK — THE DCB FACILITIES

[3] Between 1994 and 1995, the first defendant was granted various banking facilities by the first bank; then known as 'Development & Commercial Bank Berhad' (D&C Bank). The first can be found in a letter of offer dated 4 February 1994 (first letter of offer) and a facility agreement dated 12 July 1994 (first facility agreement). Inter alia, it included an overdraft of RM1.15m and a letter of guarantee of RM350,000 (first facilities).

[4] Through a second letter of offer dated 1 June 1994 (second letter of offer) and facility agreement dated 1 September 1994 (second facility agreement), D&C Bank granted the first defendant additional banking facilities of, inter alia, an overdraft of RM5m and a letter of guarantee of RM3m (second facilities).

[5] By letter dated 3 November 1994 (third letter of offer), D&C Bank amended the provision of 'security' under item (d) in the second letter of offer.

[6] On 17 December 1994, D&C Bank changed its name to DCB Bank Bhd (DCB Bank).

[7] The first defendant then renewed the first facilities and the second facilities upon the terms and conditions found in letter of offer dated 19 August 1995 (fourth letter of offer). The first facilities and the second facilities were secured, inter alia, by the following:

(a) a joint and several guarantee dated 12 November 1994 executed by the second to the sixth defendants — first guarantee;

(b) a deed of assignment of the contract proceeds dated 1 September 1994 executed between D&C Bank and the first defendant (Pembinaan YCS Bhd) — first assignment;

(c) a deed of assignment of the contract proceeds dated 9 November 1994 executed between D&C Bank and the first defendant (Danec Corp Sdn Bhd) — second assignment;

(d) a deed of assignment dated 9 May 1995 executed between DCB Bank and the first defendant (Ho Hup Construction Co Bhd) — third assignment;

(e) a deed of assignment dated 13 February 1996 executed between DCB Bank and the first defendant (Dekon Sdn Bhd) — fourth assignment;

(f) a deed of assignment dated 28 June 1996 executed between DCB Bank and the first defendant (Europlus Corp Sdn Bhd for Drainage works to terrace factory Phase 1–2 at Bandar Bukit Beruntung) — fifth assignment; and

(g) a deed of assignment dated 16 June 1997 executed between DCB Bank and the first defendant (Noble Rights Sdn Bhd for drainage works for Rancangan Perumahan dan Perusahaan Lot No 1722 Mukim of Serendah) — sixth assignment.

[8] Under the terms of both facilities as found in the letters of offer and the agreements, the first defendant was to pay DCB Bank inter alia interest at the rate of 2.5%pa over and above the base lending rate from time to time; and additional interest in the event the first defendant exceeded the limit of the overdraft facility.

[9] On 1 July 1997, there was another name change. This time, DCB Bank changed its name to RHB Bank Bhd. The related letters and documents must now be read to accord with the change in D&C Bank's name to DCB Bank and later to its present name of RHB Bank Bhd.

THE SECOND BANK — THE BU FACILITIES

[10] Between 1995 and 2002, the first defendant took out several other facilities with the second bank, Bank Utama (Malaysia) Bhd (Bank Utama). The first facility can be found in Bank Utama's letter of offer dated 4 October 1995 [(fifth letter of offer) and facility agreement dated 13 October 1995 (third facility agreement). Here, the first defendant was granted, inter alia, an overdraft of RM600,000 (third facilities).

[11] The next facility was settled through a letter of offer dated 23 December 1995 (sixth letter of offer) and a facility agreement dated 13 October 1995 (fourth facility agreement). Here, the first defendant was granted, inter alia, an overdraft of RM800,000 and a bank guarantee of RM210,000 a total of RM1,010,000 (fourth facilities).

[12] There followed another letter of offer dated 28 December 1996 (seventh letter of offer) and a facility agreement dated 3 April 1996 (fifth facility agreement). Here, the first defendant was granted additional facilities comprising, inter alia, an overdraft of RM900,000 and a bank guarantee of RM235,000 totaling RM1,135,000 (fifth facilities).

[13] The terms of the seventh letter of offer were amended or varied by letters of offer dated 5 July 1996 and 12 November 1996 respectively (eighth and ninth letters of offer). Then came the tenth letter of offer dated 4 August 1997 and facility agreement dated 18 August 1997 (sixth facility agreement). By this, the first defendant was granted an additional overdraft of RM2.4m (sixth facilities).

[14] Subsequently, another two letters of offer dated 15 January 2002 and 29 January 2002 (11th letter of offer and 12th letter of offer respectively) followed together with a facility agreement dated 5 June 2002 (seventh facility agreement).

[15] On 8 April 2003, all business, assets and liabilities of Bank Utama were vested in RHB Bank Bhd, the plaintiff through a vesting order of even date.

[16] The first defendant's facility with Bank Utama, now called RHB Bank Bhd was revised on 18 February 2004 pursuant to the first defendant's request. The drawing limit of the overdraft was now increased to RM2,177,627. The bank guarantee of RM445,000 was at the same time cancelled. All this can be found in the plaintiff's letter of offer dated 2 April 2004 (13th letter of offer).

[17] The third to the seventh facilities or the facilities taken with the second bank were secured, inter alia, by the following:

(a) a guarantee dated 11 October 1995 executed by the second to the sixth defendants — second guarantee;

(b) a guarantee dated 4 January 1996 executed by the second to the sixth defendants — third guarantee;

(c) a guarantee dated 3 April 1996 executed by the second to the sixth defendants — fourth guarantee;

(d) a guarantee dated 18 August 1997 executed by the second to the fifth defendants and the seventh defendant — fifth guarantee;

(e) a guarantee dated 29 October 2001 executed by the second, fourth, fifth and seventh to the ninth defendants — sixth guarantee;

(f) a guarantee and indemnity dated 5 June 2002 executed by the second, fourth, fifth, and seventh to the ninth defendants — seventh guarantee;

(g) a deed of assignment dated 4 January 1996 executed between Bank Utama and the first defendant (Europlus Corp Sdn Bhd for road, drainage and sewerage works to double storey houses (Phase 4) at Bandar Bukit Beruntung) — ninth assignment;

(h) a deed of assignment dated 3 April 1996 executed between Bank Utama and the first defendant (Mancon Bhd) — tenth assignment;

(i) a deed of assignment dated 19 November 1996 executed between Bank Utama and the first defendant (Selesa Health Farm Bhd) — 11th assignment;

(j) a deed of assignment dated 18 August 1997 executed between Bank Utama and the first defendant (Noble Rights Sdn Bhd for the construction of double storey terrace houses Mukim of Serendah) — 12th assignment;

(k) a deed of assignment of contract proceeds dated 30 April 1999 executed between Bank Utama and the first defendant (Taman Gelora Development Sdn Bhd) — 13th assignment;

(l) a deed of assignment of contract proceeds dated 28 July 2000 executed between Bank Utama and the first defendant (Maxisegar Sdn Bhd) — 14th assignment;

(m) an assignment of proceeds executed between Bank Utama and the first defendant dated 5 June 2002 in respect of contract awarded by Jabatan Kerja Raya) — 15th assignment;

(n) charge over fixed deposit and credit balances dated 5 June 2002 executed between Bank Utama and the first defendant; and

(o) letters of set-off dated 13 October 1995, 26 December 1995, 3 April 1996, 18 August 1997 and 5 June 2002.

[18] Under these facilities and letters of offer, the first defendant had agreed to pay Bank Utama, inter alia, interest on the overdraft facility at the rate of 2.5%pa over and above the base lending rate from time to time. The first defendant had also agreed to pay additional interest of 1%pa over and above the prescribed rate in the event the first defendant exceeded the limit of the overdraft facility.

[19] In all the facility arrangements, there were terms and conditions concerning the imposition, variation and calculation of interest rates. There were also terms providing for the preparation and reliance on statement of accounts as final and conclusive proof the first defendant's indebtedness; and the service of notices or demands.

[20] Once again, all these letters of offer and related documents must now be read to accord with the terms of the vesting order. References to 'Bank Utama' must now be read to refer to RHB Bank Bad, the plaintiff.

THE GUARANTEES

[21] From the above arrangements, there can be seen that there were several guarantees executed from time to time. All these guarantees were personal guarantees. Broadly, for ease of understanding and without going into the particular terms of each of these guarantees, the identities of the guarantors are as set out below:

DCB:	1st guarantee:	2nd – 6th Defendants
BU:	2nd to 4th guarantees:	2nd – 6th Defendants
BU:	5th guarantee:	2nd – 5th, 7th – 9th Defendants
BU:	6th guarantee:	2nd, 4th, 5th, 7th – 9th Defendants
BU:	7th guarantee:	2nd, 4th, 5th, 7th – 9th Defendants

[22] It can be immediately seen that some of the guarantors came in at different points in time. Yet, when the first defendant defaulted and the Plaintiff subsequently terminated and recalled the facilities, it made no distinction between the defendants. This is also reflected in the statement of claim. I shall deal with this in detail later.

THE DEFAULT

[23] All the facilities were disbursed to and utilised by the first defendant.

Unfortunately, the first defendant defaulted in its monthly repayments. The plaintiff's solicitors issued a letter of demand dated 29 September 2005 on the first defendant requiring the settlement of RM324,000 (as at 10 September 2005). Despite this demand, there was no settlement. The plaintiff then terminated and recalled all the facilities as well as demanded the settlement of all outstanding sums together with interests. As at 20 October 2005, that sum stood at RM3,620,834.85 together with interests. Unfortunately, that too, failed to elicit any payments.

[24] The plaintiff caused its solicitors to issue to all but the first defendant letters of demand dated 22 November 2005. The first defendant was issued a letter of demand earlier, on 10 November 2005. Although these letters of demand were received by the defendants, there was no settlement.

THE CLAIM

[25] The plaintiff's claim that all the defendants are jointly and severally liable for the following:

(a) principal sum of RM3,620,834.85;

(b) interest at the rate of 2.5%pa over the plaintiff's base lending rate from 21 October 2005–25 November 2005 chargeable on RM3,431,943 (existing limit);

(c) interest at the rate of 3.5%pa over the plaintiff's base lending rate from 21 October 2005–25 November 2005 chargeable on the amount due above the existing limit, that is RM188,891.85;

(d) interest at the rate of 3.5%pa over the plaintiff's base lending rate from 26 November 2005 till the date of realisation chargeable on the principal sum; and

(e) costs on a solicitor and client basis.

THE DEFENCES

[26] Although represented by different counsel, the defendants had common and specific defences.

[27] The defendants alleged that the pleadings are defective for several reasons. First, because there is no co-relation between the two accounts held with the two banks and the three RHB accounts now presented as evidence of the facilities taken by the defendants. The defendants claimed that the plaintiff had not explained how the accounts had migrated from the DCB Bank and

Bank Utama accounts to the present RHB accounts. In fact, the first defendant denied having operated the three accounts; denied having any records of how these accounts arose; and that it was not notified of the limits of the operation of these accounts.

[28] In the first defendant's defence, it was specifically alleged that the merging or consolidation of the various accounts without prior notification to the first defendant had prejudiced the first defendant. For example, it was said that the rates of interest imposed and the repayment modes had been altered. With these changes, the first defendant claimed it was no longer bound by the terms and conditions of the various facilities agreements and letters of offer.

[29] Second, the securities which had been furnished had not been fully taken into account and pleaded. According to the defendants, the plaintiff must plead the details of all the securities and the actions taken in relation to each of these securities. If the securities have been realised, these too, must be pleaded in full.

[30] Third, there was no full accounting to the first defendant of the accounts opened. Once again, the defendants say that the plaintiff must account for all the accounts opened; explain how each account was managed, settled or closed; the use of the term 'existing limits', how interests are calculated; and how the accounts are in their present state. It was also alleged that these 'existing limits' were arbitrarily fixed by the plaintiff without notice or consent of the first defendant.

[31] With these deficiencies and failures, it was contended that the plaintiff had failed to prove its case. The certificates of indebtedness produced cannot be relied on as the certificates referred to the debts outstanding under the three RHB accounts. Since the plaintiff had not shown how the DCB Bank and Bank Utama accounts have become the RHB accounts, these certificates are inapplicable. Further, the relevant clauses in the facility agreements required the production of the accounts together with the certificates. Without that production, the certificates prepared are of no assistance and must be ignored.

[32] In addition to the above, the seventh defendant pleaded that he had no knowledge of the matters relating to the facilities because he took no part in their documentation. The assignments of contract proceeds to the plaintiff was said to fortify his contention. The seventh defendant also claimed that he could not possibly be liable for the whole sum as he only stepped in as a director of the first defendant in 1997. He had also only signed three out of seven guarantees, that is, the fifth, sixth and seventh guarantees. He therefore had a limited involvement in the affairs of the first defendant.

[33] Aside from the defences already identified, the defendants who were guarantors contended that they could not be liable for all the facilities irrespective of whether the facilities were taken with DCB Bank or Bank Utama. It was these defendants case that the plaintiff cannot merge or consolidate the facilities by virtue of the events that took place within the plaintiff's corporate sole and affairs.

THE ISSUES

[34] Each learned counsel did careful and fairly extensive and conscientious oral and written submissions on behalf of their respective clients. As highlighted earlier, the difficulties in this case arise because of the multiple facilities, numerous parties involved and, the many changes within the plaintiff itself. The court records its appreciation of the efforts of each counsel and in particular, the plaintiff's counsel in preparing tabulations and matrix of the multiple facilities and parties involved over the passage of ten years. This has substantially assisted in the visual and speedier appreciation of the overall picture and the material events. The submissions have also been extremely involved, painstaking and, thorough. Such detailed, careful research and conduct of the proceedings is to be commended and ought to be emulated.

[35] The respective defendants' counsel have also 'shared out' the issues to be dealt with by each of them. That was again a commendable approach as it allowed each of them opportunity to develop the particular issues shouldered. For the sake of completeness and to avoid repetition, they further adopted each other's submissions.

[36] From the pleaded case of the parties and the submissions made, these are the real issues in dispute:

(a) whether all the defendants are liable for all sums outstanding regardless of the identity of the lending bank; and

(b) what are the outstanding sums?

[37] In relation to the first defendant, save for the issue of quantum, its accountability for all the facilities enjoyed from the two banks is simpler when compared to the guarantor defendants. This is because the first defendant is not really disputing that the facilities were enjoyed. It is however disputing that the plaintiff has proved its claim.

[38] The claim against the guarantors is pitched on the following contentions:

(a) that all the guarantors had agreed to be jointly and severally liable for the

outstanding sums as if they were the principal debtors, whether certain or contingent now or hereafter owing or incurred to the plaintiff from or by the first defendant on any current or other account or in any manner;

(b) none of the guarantors are discharged or released by any variation or alteration without their knowledge or consent;

(c) that the guarantee shall be in addition to and shall not in any way prejudiced or affected by any collateral or other security now or hereafter held by the plaintiff for all or any part of the money hereby guaranteed;

(d) that the guarantee was in addition to and not in substitution for any other guarantee for the first defendant to the plaintiff;

(e) that the guarantee is a continuing guarantee; and

(f) that the guarantee shall not be determined by the plaintiff being absorbed by or amalgamating with or taking over any other bank but shall enure and be available for past and subsequent advances and all other purposes for or by the absorbing or amalgamated company or concern.

[39] In deciding the issue of liability of the defendants, I propose to deal with the effect of the various changes within the plaintiff first. In dealing with this, I propose to touch on the recent Court of Appeal's decision in *ASM Metal Sdn Bhd v Malayan Banking Bhd (by vesting order dated 22 December 2000 assets and liabilities owned by The Pacific Bank Bhd taken over by Malayan Banking Bhd with effect on and from 1 January 2001)* [2011] 3 MLJ 317.

[40] Next, I shall deal with the allegation of defective pleadings where the matter of the securities, three overdraft accounts and the deeds of assignments will be discussed. This is then followed by the consideration of whether the claim and the quantum have been proved. Finally, I shall deal with the matter of the guarantors with specific reference to the seventh defendant. The principal issue concerning the guarantors is who is responsible for which facility, if at all. Thereafter, I will draw and make my conclusions.

THE TRIAL

[41] The trial of this case was somewhat stalled by some interlocutory applications. Once these applications were disposed of, the case was set down for trial. In the intervening years, the nineth defendant passed away. The proceedings were then continued against Loong Shih Keng, the administrator of the ninth defendant's estate. Proceedings against the sixth defendant were also discontinued. References to the 'defendants' must therefore be understood to exclude the sixth defendant.

[42] The remaining eight defendants were represented by different counsel. Mr MK Lam appeared for the first defendant, Miss Surinjeet Kaur represented the seventh defendant, and finally Mr David Samuels acted for all the remaining defendants. The plaintiff was represented by Mr Bahari Yeow. He was ably assisted by Mr Conrad Lopez.

[43] At the trial, the plaintiff called two witnesses, Mr Thean Soon Hin ('PW1') who is the vice-president and Head of Collection Centre of the plaintiff's Central SME Regional Recovery Centre; and Encik Hashim bin Hasan ('PW2'), the plaintiff's branch manager. The plaintiff tendered monthly statements of accounts in support of their claim. The third, fourth and seventh defendants testified as DW1–DW3 respectively. The evidence of all these witnesses will be dealt with when I address the various issues.

THE HAPPENINGS IN THE PLAINTIFF

[44] This issue ought to be dealt with first before all else. It is the happenings or the changes in the two banks which culminated in the plaintiff being vested this right to sue for the various facilities that gave the plaintiff reason to contend that it is entitled to sue all the defendants for all the facilities taken, regardless of which bank was actually behind the relevant facility; and which guarantor signed which guarantee. As pointed out earlier, this case is complicated by the events that took place within the plaintiff's establishment. Remembering what was said at the outset, the first defendant started off taking banking facilities with a bank called Development & Commercial Bank Bhd. This bank changed its name to DCB Bank Bhd on 17 December 1994. On 1 July 1997, the present name, RHB Bank Bhd was assumed. RHB Bank Bhd is the first bank. The first defendant also took out facilities with a second bank known as Bank Utama (Malaysia) Bhd. On 8 April 2003, all businesses, assets and liabilities were vested in the plaintiff. With that vesting, 'Bank Utama' ceased to exist in its own name. It is now housed in the plaintiff.

[45] These are the plaintiff's submissions on this aspect. Mr Bahari Yeow, learned counsel for the plaintiff argued that the plaintiff is entitled to launch its claim against all the defendants by reason of the fact that the facilities were all taken with the same party, the plaintiff. He then went through an explanation of the effect of the name change in the plaintiff in support of this claim relying on s 26(3) of the Companies Act 1965. Next, learned counsel argued that the vesting order made pursuant to s 50(3) of the Banking and Financial Institutions Act 1989 (Act 372) ('BAFIA') conferred the plaintiff with this right. Finally, learned counsel relied on the merger, amalgamation and consolidation provisions in the various facilities agreements for this proposition.

[46] After examining s 23(6) of the Companies Act 1965, with respect, I cannot agree with the plaintiff. Section 23(6) provides:

> (6) A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

[47] While the provision preserves the right of the plaintiff to sue, be it under its old or new name, it does not bring about the effect or conclusions suggested by the plaintiff. The Federal Court in *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401; [1995] 1 CLJ 761 had quite clearly held that a change in the name of a company 'does not affect the entity of the company'. Not affecting the entity of the plaintiff when it was DCB or BU or, RHB as it is now, is a long way off from saying that this name change allows the plaintiff to amalgamate, consolidate and merge all the facilities and the rights under the two banks as now under one bank. I will explain this further later. This is the same in relation to the amalgamation, consolidation and merger provisions in the agreements.

[48] With regards the position of the vesting order under s 50(3) of the BAFIA, this is what that provision says:

> (3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

[49] Section 50(3) explicitly provides that with the court's order, the property or business will be transferred and become vested in the transferee. Persons who are affected by the order are bound even if they did not participate or had no notice of the proceedings related to the vesting order. An order made under this subsection has precisely the full effect according to its terms. In *Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd* [2009] 3 MLJ 745; [2009] 2 CLJ 630, the Federal Court expressed its view on the intention and operation of s 50 of the BAFIA:

> In our judgment, the intention of the law expressed in s 50(1), (3), (4), (6) and (7) as a whole is to regulate the application for a vesting order and to facilitate the effectual transfer of the whole or part of the business, assets, rights and liabilities from the predecessor bank to the successor bank, and not to create obstacles to stand in the way of substantial justice.
>
> Section 50(3) provides for the mechanism of vesting of the assets and business of one entity in the other by the making of one order of the High Court. The vesting order shall have effect according to its terms 'notwithstanding anything in any law or rule of law'.

[50] The effect of the vesting order allows the successor bank to be a party to the transactions regardless of the usual prohibitions. If there were proceedings, the successor just carries on from where the predecessor left off. This was so clearly explained by the Court of Appeal in *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1997] 2 MLJ 614; [1997] 2 CLJ 131. At p 624(MLJ); p 223 (CLJ), Siti Norma JCA (later CJM) expressed the views of the court on the effect of a vesting order under s 50:

> It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus, the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank.
>
> Thus by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O 15 r 7(2), there may be a substitution of the proper party to continue with the proceedings. However by virtue of the qualifying words 'notwithstanding anything in law or any rule of law' appearing in s 50(3) of the Act, we consider that there is no necessity for a formal order under O 15 r 7(2) to regularise the position of the successor bank.

[51] In the context of the present case, the vesting order binds the defendants regardless of whether any one of them had been notified of the related proceedings.

[52] It may be safely said that the defendants have no real quarrel with that interpretation but only if the plaintiff stops there. The plaintiff did not. What the plaintiff contends today in this claim is that by reason of the name change; the vesting order made under s 50 of the BAFIA; and reading the several terms in all the guarantees relating to the validity of those guarantees, particularly on amalgamation with another bank; that there may be past consideration; and that the guarantees are continuing guarantees, all the guarantors under the DCB facilities became guarantors for the facilities taken with Bank Utama; and all the guarantors under the Bank Utama facilities had also become guarantors for the DCB facilities.

[53] Learned counsel for the plaintiff cited examples of such clauses from the first guarantee which can be found at p129 of bundle A (identical terms can be found in the other guarantees):

(a) Clause 1, where it is provided that:

> IN CONSIDERATION of you, Development & Commercial Bank Berhad, a Company … at our request making or having made or continuing advances or otherwise giving credit or affording banking facilities and accommodation for as long as the Bank may think fit to …

(b) Clause 4, where it is provided that:

> This guarantee shall be in full force and binding as a continuing guarantee upon each of us and his executors administrators liquidators or other legal personal representatives as the case may be notwithstanding any change in the name style or constitution of the customer shall be affected and notwithstanding the death or disability or liquidation of any or all of us until the receipt by the Bank from everyone of us or our executors administrators liquidators or other legal representative as the case may be of three (3) calendar months' notice in writing to discontinue this guarantee.

(c) Clause 20, where it is provided that:

> This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the money hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the monies hereby secured be in anywise prejudiced or affected by this present guarantee. And the Bank shall have full power at its discretion to give time for payment …

(d) Clause 21 which provides that:

> This guarantee shall not be determined by the Bank being absorbed by or amalgamating with or taking over any other Bank or firm or corporation, but shall enure and be available for past and subsequent advances and all other purposes for or b the absorbing or amalgamated company or concern.

[54] In my considered view, with respect, the proposition which forms the basis of the plaintiff's claim is flawed. While banks may amalgamate, change names, downsize and merge with others, such corporate exercises are well and good. But, such exercises surely cannot mean that the now amalgamated or merged bank can start to handle the client's accounts in such a manner as to create obligations where there were none before. The answer must be a resounding no.

[55] These clauses merely give the right to the new-named bank to continue where the old-named bank left off; nothing more. The privity of arrangements remained within the contracting parties and no more. The taking-over of banks cannot spell or result in the creation of legal relationships where none existed in the first place.

[56] Further, the vesting order made under s 50 of the BAFIA does not alter that position, in law or on the facts. All that it means is that the rights, liabilities and benefits hitherto enjoyed and shouldered by Bank Utama are now transmitted to RHB. If Bank Utama had already commenced an action against the defendants, RHB would simply carry on without the necessity of a formal application under O 15 r 7(2) of the Rules of the High Court 1980.

[57] Likening the predecessor bank of DCB Bank or Bank Utama 'leaving its shell' and the successor bank, RHB 'filling in the space left vacant by the predecessor bank' is again entirely different from saying that the two shells are now one just because it is the same successor bank that has stepped in. While sub-s 50(3) allows the substitution and continuation by the new bank, that is as far as it goes. The new bank, RHB is only allowed to carry on with that particular customer, the defendants in this case. It cannot bring its affairs when it was DCB Bank/RHB to Bank Utama/RHB. I do not believe it was the intention of sub-s 50(3) to abrogate the application of law beyond what is plainly written.

[58] Subsection 50(3) and the amalgamation/merger clauses in the agreements envisaged and applied to amalgamations or mergers of the entities, that is, the banks, but not to the individual facilities, contracts. Those facilities, contracts or agreements remain distinct and separate with the particular contracting parties. The fact that the plaintiff contracted with similar or common defendants does not and cannot merge their contracts as if they are now one seamless contract. The rights under those contracts remain separate and are not merged or amalgamated.

THE COURT OF APPEAL'S DECISION IN ASM METAL SDN BHD V MALAYAN BANKING BHD (BY VESTING ORDER DATED 22 DECEMBER 2000, ASSETS AND LIABILITIES OWNED BY THE PACIFIC BANK BHD TAKEN OVER BY MALAYAN BANKING BHD WITH EFFECT ON AND FROM 1 JANUARY 2001) [2011] 3 MLJ 317

[59] This case requires special mention. The plaintiff has referred to the above recent decision of the Court of Appeal. Mr Bahari Yeow felt duty bound to highlight this majority decision of the Court of Appeal which was not in his favour, but which he nevertheless strived to distinguish with his usual tenacity.

[60] In *ASM Metal*, the appellant, ASM Metal and a company known as, Kai Peng Bhd had requested that Pacific Bank Bhd ('PBB') grant a revolving credit facility to Kai Peng Bhd who became the borrower. As security, ASM created inter alia, a third party charge over one of its properties in favour of PBB. Separately, Kai Peng Bhd had also executed a corporate guarantee in favour of an overdraft facility granted by PBB to Kai Peng Vessels Sdn Bhd. Kai Peng Bhd defaulted in repayments under both the revolving credit and the corporate guarantee. PBB's assets and liabilities were subsequently vested in Malayan Banking Bhd (MBB), the respondent under s 50 of the BAFIA. When there was a default in repayment, MBB's solicitors served a notice in Form 16D of the National Land Code requiring ASM to remedy the default under the charge. Foreclosure proceedings were initiated and an order for sale was obtained.

[61] ASM resisted MBB's claim on the ground that MBB was only entitled to claim under the charge and not the indebtedness under the corporate guarantee. In a majority decision, and after reviewing the cases cited, namely *Cambridge Credit Corpn v Lambard Australia Ltd* (1977) 136 CLR 608; *Kawood Sdn Bhd v HSBC Bank Malaysia Bhd & Ors* [2001] MLJU 650; *Re Tararone Investments Pte Ltd; Development Bank of Singapore Ltd v Ong Yew Huat & Ors (Judicial managers of Tararone Investments Pte Ltd, jointly and severally)* [2001] 4 SLR 167; and *Pledge v White* [1896] AC 187, the Court of Appeal opined as follow:

> In our view the cases mentioned above can be distinguished on the ground that the loans were made by one bank only. There is nothing in the vesting order to say that the respondent may amalgamate their rights and the rights of PBB. In the instant case the charge was to secure the loan given by PBB to the borrower. As such we are of the view that cl 7 of the annexure to the charge must be viewed in that context. Even though the wording of cl 7 seems to be wide the charge in our view was only to secure the revolving credit facility granted by PBB to the borrower. It was not the intention of the parties that the charge would cover the indebtedness of the borrower under the corporate guarantee given by the borrower in favour of the respondent in respect of the overdraft facility granted by the respondent five years earlier to Kai Peng Vessels Sdn Bhd.

[62] The Court of Appeal agreed with the High Court's decision that the respondent could not combine the sums owing under the revolving credit facility and the overdraft facility. The respondent simply had no right to the sums demanded. The vesting order did not confer on the respondent the right to amalgamate both the revolving credit facility and the overdraft facility and make the ASM liable to the respondent for both.

[63] Learned counsel for the plaintiff attempted to argue the non-application of that decision to the facts of the present case on the basis of

a need to distinguish between rights ad rem and rights in personam. Learned counsel suggested that there is a material difference in the present case because unlike the foreclosure action against ASM Metal which was actually an action in rem, the present action involved only actions in personam against the guarantors. On that score, the ratio decidendi in that decision should be treated with caution.

[64] With respect, I must disagree. The significance of the Court of Appeal's decision lies in the determination of the existence or otherwise of a right of action by the respondent; and not how or the manner that right is enforced. The Court of Appeal had clearly found that the respondent did not have the right to sue as the two facilities were clearly distinct and separate. In fact, that decision of the Court of Appeal applies and binds.

[65] Similarly, the two facilities from the two banks cannot be combined. The vesting order in this case did not confer on the plaintiff the right to amalgamate both facilities with the two banks to make the defendants liable for both as if these facilities are a single facility to start with.

[66] I will return to this issue when dealing with the guarantees and the liability of the various defendants.

IS THE STATEMENT OF CLAIM DEFECTIVE?

[67] Generally, an allegation of this nature merely requires an examination of the pleadings. However, as it is closely related to the matter of the accounts, I shall also examine this contention from the evidence presented before the court.

[68] The contention here is that the statement of claim is so defective and so bad that it undermines the claim. The defect was in the failure to plead the securities furnished; and the failure to account for what had happened to each of these securities including the uplifting or realidation of these securities. It was also added that there was no full accounting to the first defendant of the bank accounts operated. In particular, the defendants claimed that para 37 of the statement of claim is bad. It reads:

> 37 The Plaintiff has vide its solicitors' letter of demand dated 10.11.2005, namely Messrs Lee Hishamuddin Allen & Gledhill, to the 1st Defendant cancelled, terminated and recalled the Facilities pleaded above and demanded for the total outstanding sum due and payable under the Facilities in the sum of RM3,620,834.85 as at 20.10.2005 together with interests. Particulars whereof are within the best knowledge and information of the 1st Defendant and as follows:
>
> Particulars

Facilities	Account No.	Existing Limit (RM)	Outstanding Balance Payable (RM)
Overdraft	2–12116–00028200	103,982.00	109,185.23
	2–12116–00021221	1,187,906.00	1,245,193.07
	2–14361–50050887	2,140,055.00	2,266,456.55
Total		**3,431,943.00**	**3,620,834.85**

(1) interest chargeable on RM3,431,943.00 ("Existing Limit") at the rate of 2.5% per annum over the Plaintiffs Base Lending Rate from 21.10.2005 until 25.11.2005; and

(2) interest chargeable on the amount due above the Existing Limit at the rate of 3.5% per annum over the Plaintiffs Base Lending Rate from 21.10.2005 until 25.11.2005;

(3) interest chargeable on the amount RM3,620,834.85 at the rate of 3.5% per annum over the Plaintiffs Base Lending Rate from 26.11.2005 until the date of full realization.

However, the 1st Defendant failed, refused and/or neglected to pay the amount claimed or any part thereof.

The Plaintiff shall refer to the letter of demand dated 10.11.2005 for its full terms and effect thereof during hearing and/or trial.

[69] Paragraph 37, as seen from above alluded to three overdraft accounts which the defendants contended were pleaded for the first time in the tables set out at para 34 of the statement of claim:

34 The 1st Defendant has committed an event of default under the Agreements whereupon the 1st Defendant has committed default of the monthly repayment amount of the banking facilities pleaded above in the sum of RM324,000.00 as at 10.9.2005, the particulars of which are as follows:

Overdraft 1 (Account No 2–12116–00028200)

Due Date	Amount due as at 10.09.2005
30.04.2005	RM12,000.00
30.05.2005	RM12,000.00
30.06.2005	RM12,000.00
30.07.2005	RM12,000.00
30.08.2005	RM12,000.00
30.09.2005	RM12,000.00
TOTAL	**RM72,000.00**

Overdraft 2 (Account No 2–12116–00021221)

Due Date	Amount due as at 10.09.2005
30.04.2005	RM22,000.00

30.05.2005	RM22,000.00
30.06.5005	RM22,000.00
30.07.2005	RM22.000.00
30.08.2005	RM22,000.00
30.09.2005	RM22,000.00
TOTAL	**RM 132,000.00**

Overdraft 3 (Account No 2–14361–50050887)

Due Date	Amount due as at 10.09.2005
30.04.2005	RM200,00.00
30.05.2005	RM20,000.00
30.06.2005	RM20,000.00
30.07.2005	RM20,000.00
30.08.2005	RM20,000.00
30.09.2005	RM20,000.00
TOTAL	**RM120,000.00**

[70] The defendants, especially the first defendant claimed that there is no co-relation between the three accounts that now subsist in the plaintiff with the facilities earlier arranged with DCB Bank and Bank Utama. The defendants contended that the three accounts are cited without any differentiation as to whether the accounts originated from the DCB Bank or Bank Utama; and how they came to be now claimed by the present plaintiff. The defendants also complained that the prayer for the claim of RM3,620,834.85 was a sum incorporating an amalgamation of various accounts from two different banks. The net effect of all these defects was to invite the court to draw an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950.

The securities

[71] Let me deal first with the plea on the securities; whether there is a need to plead all the securities or fixed deposits and, set out what had happened with each of the securities over the tenure of the facilities.

[72] While I agree with the defendants that the plaintiff, as a banking institution must maintain and observe compliance and accounting procedures compatible and in keeping with international standards, we are not dealing with that here. There is no necessity to plead the whole history of transactions and arrangements and neither is there any requirement to plead the minutiae of the operations of the contract in question. For this, the provisions of the Rules of the High Court 1980 dictate the requisites of pleadings all in keeping with the rules of justice and fair play.

[73] Since this claim is founded on a breach of contract, it is fundamental and essential that the plaintiff pleads the necessaries to prove its claim. This will mean that the existence of the contract, its critical or salient terms must be pleaded, particularly those that are relied on to show the breach; the breach or circumstances of the breach; the damage alleged suffered; the call for remedy, and finally the reliefs sought. It is my view that these requirements have been met in the statement of claim. It is further my view that the matters alluded to by the defendants do not violate these fundamentals of pleading.

[74] What had happened in *United Malayan Banking Corporation Berhad v Palm Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206; [1982] CLJ (Rep) 358 is quite different from the circumstances in this case. The claim there was for a sum of RM8.5m. Following the filing of a defence and counterclaim, the plaintiff filed a reply and defence. There were also amendments to the defence and counterclaim. After all this, the plaintiff sought to enter summary judgment for a sum of RM3.4m. This lesser sum arose because in the intervening period, unknown to the defendant, the plaintiff disposed of shares lodged as security. It was this failure or omission to plead that the Federal Court took exception to. In this case, none of that is present. The amount claimed remains the same. It is for the sum still outstanding after the realisation of the securities. In my view it is sufficient for the plaintiff to plead that all securities have been realised.

[75] The purging of the plaintiff's documents after a certain requisite period is not indicative of anything except compliance and adherence to good practices of archiving and good office administration. Again, with respect, such conduct in the facts and circumstances of the case does not warrant the engagement and operation of s 114(g) of the Evidence Act 1950.

[76] As reminded by the Court of Appeal in *Sistem Penyuraian Trafik KL Barat Sdn Bhd v Kenny Heights Development Sdn Bhd & Anor* [2009] 3 MLJ 809; [2009] 4 CLJ 57 and *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp* [2009] 2 MLJ 765; [2009] 3 CLJ 10, reiterated recently by the Federal Court in *Kumaran Sappani v Public Prosecutor* [2011] 3 CLJ 251, the circumstances of the case must first be examined. Here, there is no evidence of any withholding or suppression of evidence in which case an adverse inference cannot be considered.

The three overdraft accounts and deeds of assignments

[77] The pleadings are said to be defective because of the three overdraft accounts. It was the defendants' case that separate accounts had to be opened in each case, that is, for every project undertaken by the first defendant. The defendants also took issue with the non-production of all the deeds of

A assignments, suggesting that had all the deeds of assignments been produced, it will then show that the accounts have been settled.

[78] In relation to the existence and state of the three accounts, I must say, at the outset, that I did not get any impression of this sort from any of the defendants' witnesses, especially from DW2 who was really the defendants' main witness and who was most familiar with the defendants' financial operations.

[79] With respect, I also find this in reality a case of much ado about the operation and management of the accounts in relation to the facilities which has no real relevance or impact in this case.

[80] In my view, these matters do not affect the validity of the claim so long as the plaintiff is able to prove its claim. While the facilities from the two original banks remain apart and separate especially in relation to the guarantors, this does not mean that the accounts in relation to the two sets of facilities cannot be housed in some common account or accounts, or three as is the case here, and in the now single bank. Of course, they can. What is important is that the plaintiff must be able to explain for its claim.

[81] It is further my view that, unless specifically agreed otherwise by the parties, the management, conduct and operation of accounts are matters quite outside the concern of the court. So long as the plaintiff can account for the details in the management and operation of the accounts, it does not make any sense or serve any purpose to delve into matters that the parties were quite content with during the tenancy of the facilities.

[82] Further, the following milestones must be borne in mind: 1 July 1997 when DCB changed its name to its present name; and 8 April 2003 when the vesting order was made. On this second date, RHB had expanded its portfolio to include the businesses that were previously under Bank Utama. Now, the first defendant's default was two-staged. The first was on 10 April 2003, the second on 18 February 2004. But, by both dates, the relevant accounts be it overdraft 1, overdraft 2 or overdraft 3 were already managed under the plaintiff's present name. By this date, it is reasonable to say that the defendants were already familiar with the management of their facilities and accounts.

[83] The records (statements of accounts) show that the first defendant was in the know as to the relevant accounts which housed the respective facilities. Changes that related to the account particulars do not further impact on the integrity of such evidence. The plaintiff has also shown that the first defendant, like its other customers, was informed or alerted of the plaintiff's then

impending change to the new integrated banking system. These notices were incorporated into statements of accounts sent to the first defendant.

[84] Insofar as the deeds of assignments are concerned, the plaintiff's response was this — where the relevant project had been completed and the relevant account had been settled, the related assignments were not produced. Since the present claim is for the accounts that were still outstanding, the plaintiff only produced the related deeds of assignments. This was the consistent evidence of both PW1 and PW2 despite the rigorous cross-examination by all three learned counsel for the respective defendants.

[85] I find this explanation both plausible and reasonable. There is no necessity or benefit served in producing the total history of communications and documentations between the parties. It will only lead to prolonged and protracted proceedings. What is necessary is the production of evidence to prove the plaintiff's claim as pleaded and not, evidence to assist the defendants in proving their defence. If the defendants say that certain securities or fixed deposits have been uplifted or realised and have not been taken into account, then it is for the defendants to produce that evidence; not the plaintiff.

[86] In this case, these records which the defendants speak about are such that copies of the same would have been with the first defendant. It is incumbent on the defendants themselves, in preparation for trial to see to the inclusion of such documentation in the event the defendants were of the view that these documents were relevant to their case.

[87] Unfortunately, the defendants do not have copies of those documents to verify the plaintiff's claim. The reasons become clear when the fourth defendant, DW2's testimony is examined. Both DW1 and DW3 were not able to offer much assistance in this respect. Both of them testified that financial matters were left in the able hands of DW2. All three witnesses for the defendants, especially DW2 were very candid and forthcoming in their testimonies. This is DW2's testimony in this regard.

[88] DW2 was a director of the first defendant. He was 'primarily in charge of lobbying for projects and arranging for banking facilities to finance the various projects undertaken by the 1st Defendant'. He was responsible for securing the facilities with both D&C Bank and Bank Utama. His evidence actually substantially confirmed the evidence of the plaintiff. DW2 testified that the security arrangements made involved the assignment of all rights to proceeds of contracts awarded by third parties to the first defendant directly to the plaintiff; maintaining fixed deposits; and guarantees provided by the first defendant's directors. In cross-examination, he agreed that the facilities had been disbursed and utilised by the first defendant.

[89] DW2 testified that although the facilities were enjoyed by the first defendant, the defendants were resisting the claim because 'it is based on three RHB overdraft accounts as mentioned at paragraph 37 of the Statement of Claim found at page 81 of the Bundle of Pleadings'. He took the view that the plaintiff had failed to account for all the securities furnished and whether these securities had indeed been utilised to reduce the indebtedness.

[90] However, DW2 also testified that the:

> … various letters of offer under Bank Utama actually combined the different overdraft into a combined limit and it will be drawn down based on the assigned contract at that particular time. So I wouldn't know exactly like how much has actually been drawn down or not drawn down or what portion of it.

[91] At the same time, DW2 also told the court that:

> To my memory I wouldn't remember how many assignments actually there are under D&C Bank because the projects were assigned from time to time and then deeds of assignments were entered into. And how many actually I couldn't quite remember I mean as a matter of fact. But it so happened that because one of the assigned contracts mentioned from the 1st to the 6th deed of assignments is actually for Europlus contract. That relates to exactly the same time where the other deed of assignment for the other project was actually awarded. But other than that whether there are any others or how many there are actually because there is no sort like a running sequence to this sort of thing. That is why I am not very sure.

[92] DW2 added that it was:

> Only by viewing all the project account statements from each of the 15 assignments can it be determined that the 3 RHB accounts are secured by the 15 assignments as pleaded and that they had been correctly applied towards repayments.

[93] In short, he wanted the plaintiff to show how the accounts had been managed and operated.

[94] Now, the real reason why the defendants do not have copies of the documents now sought was because they themselves did not keep any record. In DW2's words:

> Because it happened so many years ago, we don't. In fact the company has actually closed down its operation not too long after the bank took action against the company.

[95] He further added:

> After the company actually sort of stop operation, I am not very sure really as at today where the records were really kept. The problem is because when the company actually stopped operation basically the business actually like closed down and nobody bothers to keep records of things anymore and the whole thing just deteriorated.

[96] This evidence of DW2 is extremely telling. From his frank testimony, it would appear that at the time when the first defendant was able to meet repayments, which it did to a substantial extent, there was very little concern over the documentation, and where the relevant documents were kept. In fact, DW2 was not even sure if copies were sent to the first defendant by the lawyers because 'all the deeds of assignments were executed at the lawyers' office'. In his words:

> I was thinking whether actually what I say is I have it because the reality of it is we don't actually keep track of the deed of assignment because sometimes the lawyers don't send.

[97] Further, the first defendant did not 'really have a person to actually be in charge of legal documentation of the facilities' under both banks. When the action was filed, DW2 tried to gather as many documents as he could because 'actually to be honest nobody is in the mood to actually look at things'.

[98] In my judgment, the defendants' problem really was being able to understand the plaintiff's claim and to reconcile with the accounts today. It was for that purpose that the defendants wanted sight of full documents. According to DW2, the 'account department people' of the first defendant would know. But, the accounts department and the staff who kept the records had long left the first defendant. While the projects have also been, completed, the financial matters of the first defendant have yet to be unraveled and settled.

[99] The conclusion that can be drawn is that the defendants themselves were at a loss today as they were no longer in possession of their own documents. The closure if not collapse of the first defendant's once fast thriving business appear to have been swift and almost merciless. All three witnesses for the defendants did not for a moment suggest that they did not owe the plaintiff. In fact, there is this sense of accountability on their part. What they were unable to come to terms with was the extent; and this was only because they no longer had their copies of the relevant documents such as statements and letters.

[100] Unfortunately, these matters are no reasons to say that the plaintiff must produce all the deeds of assignments which have no bearing on the claim before the court; that the accounts are wrong or unreliable; or that the

pleadings are defective. All these matters and problems that DW2 spoke of are all internal administrative, financial and management matters of the first defendant. The level at which they operated and what problems the defendants finally encountered when the first defendant ceased active operations should not be reasons why the plaintiff has now to provide for or account to the defendants in the manner suggested.

[101] In a case of this nature, with the multiple assignments and facilities, the contemporaneous conduct of the parties at the relevant time is most indicative of the real condition and position. And, in this respect, the defendants displayed conduct consistent with the plaintiff's contention that the defendants understood how the accounts had been consolidated and managed. That right to consolidate rests with the plaintiff as agreed by the parties in the various facilities agreements. The defendants were never impaired in their appreciation as to how the different facilities and accounts were operated and managed.

[102] As testified by PW1, the fixed deposits pledged by the first defendant as securities under the facilities granted by D&C Bank/DCB Bank had been uplifted to reduce the first defendant's indebtedness. The first defendant was notified at the material time through the plaintiff's letter dated 10 April 2003 (see p 34 CBD3). In this letter, the first defendant was notified that fixed deposits totaling RM1,183,932.33 had been uplifted. The proceeds from this exercise were utilised to reduce the indebtedness found in two accounts which housed the first defendant's arrangements with D&C Bank/DCB Bank, namely Account No 21211600028200 (overdraft 1) and Account No 21211600021221 (overdraft 2). This exercise was reflected in the relevant statements of account — pp 73(a) and 159 of CBD4.

[103] The same exercise was also carried out in relation to the fixed deposits under the Bank Utama facilities. This time, however, the call came from the first defendant vide its letter dated 18 February 2004. The first defendant instructed the plaintiff to uplift the fixed deposits pledged in order to reduce the indebtedness under Account No 214361-50050887 (Overdraft 3) — see pp 475–476 CBD5.

[104] Therefore, the evidence shows that the first two accounts pleaded at para 37 with details found in para 34 of the statement of claim relate to the DCB Bank facilities whereas the third account relates to the facilities with Bank Utama. Ultimately, these arrangements and changes were made to accommodate and benefit the first defendant, and I find it somewhat troubling and highly inappropriate that the first defendant should now take issue with steps taken at its behest.

[105] The change of the account numbers by the plaintiff was never questioned at the material time and the defendants continued to operate and use those accounts with the plaintiff with nary a problem. The defendants, especially DW2 and 'account department people' of the first defendant to whom the financial matters of the first defendant was entrusted, were never, at the material time, troubled by the way the accounts were kept. It is rather late in the day for the defendants to complain otherwise.

[106] The correspondence between the parties as found in the bundles filed is also very telling. By letters dated 4 November 2004 and 13 April 2005, the latter enclosing installment repayments show that the first defendant was not in the least ruffled, perturbed or even confused as to where and how the accounts were operated and managed. The letters sent by DW2 on behalf of the first defendant reveal DW2 to be very familiar with the affairs of the first defendant. He was in correspondence with the plaintiff having attended numerous meetings and many more discussions with the plaintiff, be it during the better times, or during the times when the parties were looking to resolve matters between them.

[107] This correspondence between the parties indicated a confident, comfortable and reliable accord between the parties in respect of how the facilities were being operated and how things stood between them. Such an accord could not possibly exist but for the state of truth between the parties. The contemporaneous records which include substantially the first defendant's own documents in the form of its letters to the plaintiff never at any time, question or even seek clarification on the matters now complained of.

[108] From the contents of the letters sent, there is no doubt in my mind that the manner in which the plaintiff kept the first defendant's accounts were of the least concern to the defendants. It was only after the first defendant had problems with their business; and this suit was filed that the defendants started asking questions, in fact, I would go so far as to say that the defendants were never in dispute as to the liability for the debts.

[109] In any case, the terms in the respective letters of offer and facilities agreements are in fact wide enough to allow the plaintiff to accept changes in contracts which were finally assigned to the plaintiff by the first defendant. The evidence before the court further revealed a good healthy customer-banker relationship between the parties at the height of times where indeed, the plaintiff accepted the assignments of different contracts from the first defendant when sought by the first defendant.

[110] Furthermore, these concerns of the defendants actually pertain to matters arising in the early days of the operation of the facilities. I would say

A that these matters generally would have already been in place at the outset. If there were no assignments or no separate accounts as described by the defendants, there would have been at least, some evidence of that concern or complaint from the first defendant, seeking at the very least explanations or accountability from the plaintiff at the material time. There is only deafening
B silence from the first defendant.

[111] I further venture to say that if there were no assignments and no payments of proceeds from the various projects, be it into the overdraft or the project accounts, the default would have been much earlier than that presented
C today. In fact, in answer to Mr Samuel's question as to why it was not possible that the plaintiff had not included all the assignments which securitised the loans, DW1 put it succinctly:'Because the bank will not allow drawdown if there is no proper documentation.'

D

[112] I observe the defendants who stepped forward to testify as forthright and credible witnesses. But, that does not mean that the Plaintiff witnesses were less. All that these defendants sought really was an explanation as to how the figures added up. They were really not in the position to verify any of the
E plaintiff's figures as they no longer had their set of documents. The 'collapse' of the first defendant's once thriving business appeared to have been swift, almost avalanche-like in its effect that the defendants had no time to gather and salvage vital financial documents that would have assisted them in the response to the plaintiff's claim.

F

[113] For the plaintiff's part, the assumption of business and thereby the accounts of the defendants were through corporate amalgamation exercises. The 'personal touch' that banks are renowned for in money matters which are delicate, sensitive, private yet totally transparent and accountable, may have
G been somehow misplaced along the way here. The defendants wanted some explanation as to what happened in their accounts. The trial appeared the only way they could obtain or achieve that explanation.

[114] There is yet another point that needs to be made and it is this. This is
H not a case of breach of the terms of the several facility agreements on the part of the plaintiff. This is not a case of the defendants alleging that the Plaintiff failed to open separate accounts for each project; or that the plaintiff failed to accept the assignments agreed in the relevant letters of offer and facilities agreement; or the like. This is not a case of the plaintiff claiming for a sum which had
I already been paid under for example assigned interests or accounts. If that be the case, then it would be incumbent on the plaintiff to prove the position of the accounts and the assignments in the sense submitted by the defendants.

[115] Since this not the case, the concerns of the defendants are not only

irrelevant for consideration but of no merit. For all the numerous reasons discussed above, the statement of claim is not defective as alleged, in which case the defendants' contention is rejected.

IS THE SUM CLAIMED PROVED?

[116] It must be reminded that the fact that the first defendant has enjoyed the facilities is not in serious dispute. What is in dispute is the computation of the sum claimed. The plaintiff bears the burden of proving this on a balance of probabilities — *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430. In discharge of that burden, the plaintiff has offered the following evidence.

[117] First and foremost, the oral testimonies of PW1 and PW2. I find PW1 a person familiar with the defendants' case. He was able to answer questions posed in cross-examination comfortably with confidence and certainty. Much of this was due to his background and his source of information. PW1 was first employed by D & C Finance in 1981. After the merger of D & C Finance with D&C Bank, PW1 was seconded to Central SME Regional Recovery Centre as its Head in December 2004. He considered himself as having joined the plaintiff in 1981. PWTs knowledge of the matters in issue stems not merely from the plaintiff's files, records and accounts relating to the facilities which had been provided to the first defendant, but from the time spent in carrying out the recovery action. The records referred to were also those kept in the ordinary course of business of the plaintiff.

[118] After testifying as to the various letters of offer, facilities agreements, securities, guarantees, uplifting of the securities, PW1 testified on the default by the first defendant in its payment obligations. Despite notices sent, the first defendant did not regularise the default. The entire banking facilities was then recalled and cancelled. To illustrate his familiarity with the defendants' accounts is PW1's evidence on how the project accounts were opened. After these accounts were opened, the drawdown and the repayments were then made into each of these accounts. In the words of PW1, the account 'acts like an OD account'. In the case of the Bank Utama facilities, there was only one OD account and one project account. All draw-downs and proceeds went into those respective accounts regardless of the number of projects. PW1 informed the court that 'the only difference between ex D & C and BU is BU allows cheques in the OD account whereas in D & C there is no cheque issued, in another word, the borrower is not allowed to issue any cheques'.

[119] In addition, there is PW2's testimony. He, too, joined the plaintiff when it was still known as D&C Bank, back in 1985. Again, this was no plain bank officer coming to testify by recanting what he finds from the bank's files,

records and accounts. He was a witness who had personal knowledge of the first defendant's accounts with the plaintiff. According to him, he 'got to know Seni Maju when I was a Branch Manager at the Subang Jaya branch of DCB Bank in 1997. Seni Maju was a customer of DCB Bank at the time. DCB Bank had also provided banking facilities to Seni Maju'. He further informed the court that he had dealings with the first defendant:

> When I was at the Subang Jaya branch of DCB Bank, I was in charge of this account and I oversee the utilization of Seni Maju's banking facilities, including the running of Seni Maju's current accounts and project accounts. I also dealt with the directors of Seni Maju, and I had also on occasions visited some of the project sites.

[120] PW2 then went on to give knowledgeable answers on the operations of the first defendant's accounts. He was cross-examined extensively on those matters and I do not propose to revisit them having dealt with the same when addressing the allegation of defective pleadings. All that needs to be said is that like PW1, PW2 gave clear and cogent evidence of the operation and status of the accounts and amounts outstanding from the defendants. Both their evidence remains good, credible and reliable despite extensive cross-examination by all counsel for each of the respective defendants.

[121] Aside from the oral testimonies of PW1 and PW2, the plaintiff tendered documentary proof of its claim. Various letters of offer and facilities agreements and statements of accounts were produced. These letters of offer and the facilities agreements provide for the imposition of various interest rates. I have no reason to doubt their purpose or interpretation as presented by the plaintiff's witnesses. From the defendants' conduct of the case and the submissions made, this aspect is also not in any real dispute.

[122] As for the statements of accounts presented in evidence by the plaintiff (see bundle CBD4 pp 1–88 and CBD5 pp 190–497), these statements are not unlike the present day 'certificate of indebtedness'. In addition, the plaintiff has tendered a 'Statement of Account of Indebtedness/Certificate of Indebtedness/Statement as to the Amount Due and Owing to RHB Bank Berhad ('RHB')' signed by one Mr Lim Guan Toong and found at pp 845–847 of CBD2 and pp 97–100 of CBD3. According to PW1, Mr Lim was the vice president of the plaintiffs commercial/SME recovery, the person authorised to sign such certificates. Both the statements of accounts and the certificates of indebtedness were prepared under the relevant provisions of the facilities agreements as well as the guarantees.

[123] Due to the period of time over which the many facilities involved here were made between the parties, the documentation was not necessarily the same in style and format. Nevertheless, the intent and purport in the contents

remained constant. In the facilities agreements, the relevant provisions were for example, cl 10.09 in the third facility agreement; cll 9(1) and (2) in the fourth, fifth and sixth facilities agreements; and cl 10.16 in the seventh facility agreement. Similar clauses exist in the several guarantees, namely cl 19 in the first guarantee; cl 12 in the second, third and fifth guarantee; and cl 11 in the seventh guarantee.

[124] I do not propose to set each of these clauses out. But, just to illustrate the point, I shall set out some of them:

Section 10.09 Statement of Account of Indebtedness

The Borrower hereby agrees that a Statement of Account of the Borrower signed by the General Manager, Manager, Accountant or Sub-Manager or any other duly authorized officer of the Bank shall be accepted by the Borrower or its successor in title or assigns as final and conclusive proof of the indebtedness of the Borrower in accordance with this Agreement.

9 ACCOUNTS

(1) The Bank will open and maintain on its books an account in the name of the Borrower with respect to the Facility and the account so maintained by the Bank shall evidence the aggregate outstanding amount due and owing by the Borrower to the Bank in respect of the Facility. The Bank shall debit to such account the principal amount owing and shall record, in accordance with its usual procedures, the interest accrued thereon, fees, commissions, costs and other charges payable under this Agreement from time to time and receipts by it or of payments in settlement thereof. This account shall, save for manifest error, be conclusive evidence as to the amount from time to time due and owing from or otherwise payable by the Borrower in respect of the Facility and the interest thereon and fees, costs and other charges.

(2) It is hereby agreed by the Bank and the Borrower that, if the Facility shall be withdrawn or revoked and or the said account or accounts current or otherwise shall be closed either by demand or by reason of liquidation or for any reason whatsoever and whether or not the relationship between the Bank and the Borrower as banker and customer shall cease and a balance shall be owing by the Borrower to the Bank, the Borrower or the successors in title of the Borrower as the case may be shall so long as the same or any part thereof shall remain owing pay to the Bank interest and where applicable additional interest thereon at the rate or rates prescribed under Clause 4 or at such higher rate or rates as the Bank may prescribe from time to time and such interest may continue to be capitalized as provided for herein from the date when such balance shall have been ascertained until full payment is received by the Bank and the statement of any authorized officer of the Bank as to the amount of such balance shall be final and conclusive.

Section 10.16 Certificate of Indebtedness

It is hereby agreed that any admission or acknowledgment in writing by the Borrower or by any person authorized on behalf of the Borrower or a judgment (by default or otherwise obtained against the Borrower) or a statement of account in writing showing the indebtedness of the Borrower which is duly certified by an authorized officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of indebtedness in a court of law.

19. Any admission or acknowledgment in writing by the customer or by any person authorized by the customer of the amount of indebtedness of the customer to the Bank and any judgment recovered by the Bank against the costumer in respect of such indebtedness shall be binding and conclusive on and against us and our executors administrators and legal representatives in all courts of law and elsewhere. A certificate by an officer of the Bank as to the money and liabilities for the time being due or incurred to the Bank from or by our customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.

12. Any admission or acknowledgment in writing by the Customer or by any person authorized by the Customer of the amount of indebtedness of the Customer to you and any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against me/us. A statement signed by your manager, sub-manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by our Customer shall be final and conclusive evidence against me/us or any one for all purposes including legal proceedings.

[125] As can be seen, regardless of whether these provisions are found in the facilities agreements or the guarantees and regardless of which bank the agreements were reached, the intent and object of the parties is patently clear. The language may have changed somewhat due to improved drafting or purely as a matter of style, but the intention remained the same, or as mentioned earlier, constant. The parties intended at all times to rely on written statements or certificates to prove the amount, sum or money due from each of the defendants.

[126] The reliance on the statements of accounts or the certificates as final and conclusive evidence of the defendants' indebtedness is a pre-arranged state between the parties. There are numerous decisions on the meaning and the value to be accorded to such statements or certificates starting from the case les celebre of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading & Anor)* [2006] 2 MLJ 685; [2006] 3 CLJ 544. The Federal Court cited and relied on the 'entrenched principles' first enunciated in its own earlier decision in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282.

[127] Since then, there is an unbroken line of authorities including decisions

of the Court of Appeal in *Tan Chong Keat v Pengurusan Danaharta Nasional Berhad* [2008] MLJU 289; [2008] 4 CLJ 748; *Melewar Leisure Sdn Bhd v Danaharta Managers Sdn Bhd* [2010] 6 MLJ 317; [2011] 1 CLJ 857 following and applying the decision in *Cempaka Finance*. Statements or certificates of indebtedness prepared within the terms of the agreement establish liability and actual indebtedness of the defendants in a conclusive and binding manner. The burden of proof then shifts to the defendants to disprove the amount stipulated in the statements or certificates.

[128] Having examined the statements and certificates very carefully, I am of the opinion that all these documents fulfilled the requirements and intention as envisaged in the clauses identified above. The details in the accounts are indeed conclusive evidence of the first defendant's indebtedness. Although only cl 9(1) in the fourth, fifth and sixth facilities agreements provides for the rebuttal of the conclusiveness of the certificate of indebtedness if manifest error can be shown; the same must hold true for the other clauses.

[129] However, it is not just any error that will deprive reliance on the certificates or statements. The defendants who bear the burden here must satisfy the dourt of the existence of manifest error in the statements or certificates. By 'manifest', it must refer to those errors that are substantial and irreconcilable that will impair the integrity of the statements or certificates rendering such statements or certificates unreliable or unsafe to be relied on. It surely cannot refer to clerical or calculation errors that can be readily explained away.

[130] To me, the defendants have not displaced that burden brought by the statements and certificates. They have not shown any disparity or 'manifest error' to merit the displacement of the plaintiff's reliance as contemplated and agreed between them and the plaintiff. It is precisely for the reasons of avoiding the laborious task of production of voluminous records and tediously pouring over them that the parties agreed to rely on such statements and certificates. In the absence of any manifest errors, to ignore the clear intent of these provisions in the agreements and guarantees would be to run counter to the agreed terms.

[131] As mentioned earlier, although there was much fuss made about these accounts, in reality there is nothing much to it. This is because the defendants themselves understood these accounts as is clearly shown in the correspondence between the parties. It cannot be disputed that the related monthly statements were received by the first defendant. In fact, DW2 admitted to this fact. At no time were there any queries or concerns raised on any of the monthly statements.

[132] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank*

Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, the Federal Court had expounded on the impact of remaining silent and not lodging proper protest if there were challenges to the accuracy of the details in any monthly statements sent. In such circumstances, the plaintiff is 'entitled to assume' that the defendants had accepted the accuracy of the contents in those statements. This was echoed by the Court of Appeal in *Yoong Sze Fatt v Pengkalen Securities* [2010] 1 MLJ 85; [2010] 1 CLJ 484 which said:

> Having failed to protest to the transactions or usage of his trading account, the first defendant must now be estopped from denying the losses arising from the trades conducted on his trading account …

[133] It must not be forgotten that at the material time, the first defendant had a finance or accounts department (as mentioned by DW2) that would have seen to reconciling the details. If there was any discrepancy, it would be reasonable to expect DW2 to have protested if not alerted the plaintiff of such discrepancy. DW2 or the first defendant's finance department would have sought prompt or reasonably prompt clarification or correction with the plaintiff.

[134] I say so because as explained by DW2, the first defendant had so many facilities with various banks, other than the plaintiff. There were many projects. For a certain period, at least between 1997 and 2004 or 2005, which was at the height of the relationship between these parties, the first defendant appear to have no problems utilising, servicing and keeping track of its finances and the state of its health. The statements sent by the plaintiff at the material time must have substantially assisted the first defendant in this respect. So, if there were any doubts, the first defendant would have raised it with the plaintiff. There being none then, it would be both wrong and unreasonable to, without much else, accept the defendants' suggestion that the sums do not add up. From their conduct and actions, the defendants are *estopped* from denying the truth of the documents sent and the amounts outstanding. On the contrary, the sums do add up.

[135] The defendants' own letters when negotiating the settlement of the outstanding sums further testify to there being no doubt in the minds of the defendants as to the operation and accuracy of the accounts maintained with the plaintiff. This documentary evidence shows that the defendants were never in doubt over the accuracy of the information found in those accounts and statements. The defendants' concern was always to find a way to settle the outstanding sums. This is clear from the correspondence between the parties. The sums mentioned in the last statements are collaborated by the letters sent by the defendants themselves.

[136] It is my judgment that none of the matters raised by the defendants such as the non-production or non-pleading of securities, or even the state of the statements of accounts where the defendants have complained about how the accounts have migrated from the old to the new account system amount to manifest error. The statements and the certificates must therefore be accorded the role that the parties had intended; and that is to represent final, conclusive and binding evidence of the defendants' indebtedness to the plaintiff.

[137] Further, having heard all testimonies, I am convinced that the claim of the plaintiff is proved. The plaintiff's witnesses have competently and confidently explained their calculations of the various principal sums and interests; and how the three accounts have been kept. These sums were specified in the notices of demand issued to the defendants. There were no protests; queries or clarifications sought. I can only infer and conclude on a totality of the evidence before me that the defendants themselves must have been satisfied with the accuracy of the sum claimed.

[138] The defendants have not and are not seriously contesting the matter of the rates of interests imposed under the letters of offer and facilities agreements. These rates can be imposed under the conditions presented and as provided in those letters of offer and facilities agreements. See *Pusat Bandar Damansara Sdn Bhd v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513; [2000] 1 CLJ 346 and the Court of Appeal's decision in *Khor Kok Kwing v The Co-operative Central Bank Ltd* (Civil Appeal No W-03–31 of 2004).

[139] Aside from the fact that the claim against the first defendant has been proved, it has also been proved that the guarantors were also sent letters of demand. This was on 22 November 2005. They, too, failed to settle. Proofs of postings to them were tendered at pp 41–100 of CBD3.

[140] In the circumstances, I find that the plaintiff has indeed, proved the sum claimed on a balance of probabilities. The first defendant is fully liable for all the facilities taken with both banks and for the full sum claimed.

THE GUARANTORS

[141] Having concluded that the liabilities to the two banks do not merge despite the merger of the banks, and that the plaintiff's claim has been proved, the next issue is the position of the guarantors.

[142] At the start of my decision, I had observed that the plaintiff's claim was against all the guarantors for the full sum outstanding regardless of the identity of the original lending bank. I have already given my views on this. From my findings above, the first defendant is liable and remains liable for the total sum

as represented in the three accounts pleaded and testified by the Plaintiffs witnesses regardless of the identity of the original lending bank. That position however, does not necessarily hold in relation to the guarantors.

[143] For the guarantors, it must be borne in mind that the first two accounts relate to the DCB facilities while the third account relates to the Bank Utama facilities. This is relevant when considering the impact of the seven guarantees. However, as guarantors and consistent with the respective contracts of guarantees, and as provided under s 79 of the Contracts Act 1950, these defendants are obliged to answer for the default of the first defendant.

The seventh defendant

[144] But, first, I need to deal with the arguments of the seventh defendant.

[145] The seventh defendant testified as DW1. He testified on behalf of all the defendants except the sixth defendant. He claimed that because he only became director of the first defendant on 4 April 1997, by which time the D&C Bank facilities were already in place, he cannot possibly be responsible for these debts. He only signed three guarantees, the fifth, sixth and the seventh. All these guarantees were with Bank Utama. His involvement with the first defendant was only from 'the engineering aspect because of my background as a civil engineer. Such I would not be familiar with the financial aspects of the company'. He claimed that he did not 'know the details of the accounts'. He was not sure which account was related to which bank; he was not even familiar with the account numbers. According to him, the fourth defendant who testified as DW2 was the person who would be most familiar.

[146] It would appear that the seventh defendant's principal defence is one of limited involvement. Limited in terms of the identity of the bank, that is only with Bank Utama. And, even then, he argued that he was not responsible for all facilities taken with Bank Utama because of his role within the first defendant.

[147] With utmost respect, the seventh defendant's arguments on his limited involvement in the sense suggested are not tenable. There is no stipulation in law that only directors can be guarantors. See *Allied Granite Marble Industries Sdn Bhd v Chin Foong Holdings Sdn Bhd* [2000] 5 CLJ 71 and *Algemene Bank Nederland NV v Kace Advertising Sdn Bhd & Ors* [1989] 3 MLJ 506; [1989] 1 CLJ (Rep) 293. I have myself similarly ruled on this in a previous decision in *Hong Leong Bank Bhd v Bennes Machinery Sdn Bhd & Ors* [2009] MLJU1344.

[148] The seventh defendant cannot disassociate himself from liability by reason of his responsibilities within the first defendant and the kind of expertise

that he brings to the first defendant. If that be the case, then the business of running corporate soles will be severely compromised. These are clearly internal arrangements that are good for the company in that the company is manned by the best and widest cross-section of expertise from engineering to finance so that the first defendant, as a construction company stands amongst the best in the country. These considerations, however, cannot deprive the public's expectations of accountability and certainly, that of third parties like the plaintiff, who have entered into transactions and arrangements with the first defendant on that understanding.

[149] The seventh defendant therefore remains accountable and liable even for past consideration and definitely for future consideration. This is clear under the terms of the guarantees that he had signed. Those terms are clear in those intents and I agree with the submissions of the plaintiff in this respect. The guarantees must be read in their entirety.

[150] Once so read, it becomes apparent that the parties, and in particular, the seventh defendant agreed to be liable for past consideration and that the guarantees shall be continuing guarantees — see *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453; [2004] 3 CLJ 436, *Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd* [2007] 4 MLJ 209; [2007] 4 CLJ 109, *Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd* [2004] 6 CLJ 320, and *Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd* [1991] 3 CLJ (Rep) 451. These authorities consistently held that where the terms of the agreements are clear on past consideration, the mere fact that the facilities had already been dispensed or enjoyed prior to the execution of the guarantees, and that liability 'only arises from the time of execution of the guarantee and not for facilities previously granted', is an argument 'devoid of merits'.

[151] Although the facilities were already disbursed by the time the seventh defendant was involved, from the terms of these guarantees, there is nevertheless good consideration to render these guarantees valid and enforceable against the seventh defendant. From his testimony, it is evident that he was well aware of these matters when he joined the first defendant; and when he agreed to be a guarantor. Therefore, the seventh defendant remains bound and liable.

[152] I shall now proceed to deal with the guarantees in detail.

The guarantees

[153] It is the contention of the plaintiff that because the guarantees concerned both past and future consideration, and that the guarantees are in

A the nature of continuing guarantees, all the guarantors are liable for the first to the last guarantee; even within the same bank. The defendants on the other hand, have suggested that one of the features of a continuing guarantee is that the latest or last guarantee will supersede the earlier or 'older' guarantees. This meant that only the seventh guarantee was relevant for consideration.

B

[154] With respect, that is not quite so. If the plaintiff's construction of the guarantees is correct, the ensuing question is why then was there a need to arrange for the additional guarantees. Surely if the plaintiff's interpretation is the correct position, then all that was needed was the first guarantee and

C nothing more. The defendants' interpretation and construction too, cannot be correct. This is why.

[155] First, the parties are not in real dispute as to these guarantees being

D continuing guarantees. For example, cll 14 and 25 of these guarantees provide:

Clause 14:

> The security created pursuant to this Agreement shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sums or sum of money due and owing under the Facility but shall be a continuing security
>
> E *and extend to cover any sums or sum of money which shall for the time being constitute the balance due from the Borrower to the Bank under or in respect of the Facility and is further expressly intended to be and shall be a continuing guarantee for all monies whatsoever now or hereafter from time to time owing to the Bank* by the Borrower whether alone or jointly and severally with another or others and whether as a
>
> F principal or surety notwithstanding that the Borrower may at any time or times cease to be indebted to the Bank for any period or periods and notwithstanding that the account or accounts of the Borrower with the Bank may from any cause whatsoever cease to be an account or accounts and notwithstanding any settlement of account or accounts or otherwise. (Emphasis added.)

G Clause 25:

> The security, liabilities and or obligations created pursuant to and by this Agreement shall continue to be valid and binding for all purposes whatsoever notwithstanding any change amalgamation reconstruction or otherwise which may be made in the
>
> H constitution of the Bank and similarly the security liabilities and or obligations created pursuant to and by this Agreement shall continue to be valid and binding for all purposes whatsoever notwithstanding any change howsoever in the constitution of the Borrower, and it is expressly declared that no change of any sort whatsoever in relation to or affecting the Borrower shall in any way affect the securities and or
>
> I liabilities and or obligations created pursuant to and by this Agreement in relation to any transaction whatsoever whether past or future.

[156] These provisions in the guarantees clearly show that the defendants' liability continue despite the new facilities taken with the plaintiff (but only

with the same entity). While that may be so, that is not the end of the matter or even the final effect of the guarantees. All seven guarantees together with the terms and conditions of the related letters of offer have to be carefully examined in order to determine the intention of the parties with respect to these guarantees.

[157] The first four guarantees were uneventful. They were signed by the same guarantors, namely the second, third, fourth and fifth defendants. These guarantees were executed because of the increased facilities taken from the plaintiff. The first guarantee with DCB Bank was for the sum of RM9.5m. The second to the fifth defendants were the guarantors under this guarantee. With the claim against the first defendant proved and the further proof of non-payment despite the demands duly served on these defendants, the plaintiff has also proved its claim against these defendants. The sums as found in the first two accounts which relate to the DCB facilities are the outstanding sums due from these defendants.

[158] What is referred to as the 'second, third and fourth guarantees' for the respective sums of RM600,000; RM1,610,000 and RM2,745,000 were meant to secure not only the principal sums mentioned but also interests and the whole balance sum outstanding. These guarantees were executed under the facilities obtained from Bank Utama.

[159] It is at Bank Utama that things changed, starting with the fifth guarantee. The defendants sought for a substitution of guarantors. The opening words in the fifth guarantee are instructive:

> In consideration of your opening or continuing an account with and making or continuing to make advances loans or otherwise giving credit or accommodation or granting time to Seni Maju Sdn Bhd a company incorporated in Malaysia and having its registered address at … (hereinafter called 'the Customer') at my/our request, for as long as you may at your sole discretion deem fit I/we … the undersigned hereby jointly and severally agree with and guarantee to you as follows, that is to say:
>
> (1) I/We will pay you on demand:
>
> (i) all moneys which now are or may during the operation of this Guarantee owing to you from the Customer or remain unpaid on the general balance of Customer's account with you anywhere and on any account whatsoever whether from the Customer alone or from the Customer jointly with or as surety for any other person or persons…
>
> (ii) …
>
> (iii) …
>
> (iv) …

[160] This guarantee has to be read together with the tenth letter of offer dated 4 August 1997 which provided the 6th facility and led to the sixth facility agreement. In its letter of offer, the plaintiff said this:

> We refer to our letters of offer dated March 28 1996, July 5, 1996 and November 12, 1996. We are pleased to advise that we have at your request pursuant to our right to review under the Letters of offer agreed to renew the existing banking facilities. We have also approved your request for additional banking facility and substitution of guarantors. The revised terms and conditions of our offer …

[161] As security condition (v), the plaintiff stipulated that:

> (v) a new joint and several guarantee of the following directors/person in their personal capacities for RM5,145,000.00:
>
> (a) Chong Yok Kewong
>
> (b) Lee Chak Yin
>
> (c) Wong Hon Sum
>
> (d) Mohamed Mushaini bin Jeram
>
> (e) Dato' Hj Abdul Hamid bin Hj Muhammad Zainuddin
>
> (This new guarantee shall supersede the existing guarantee dated April 3, 1996)

[162] In the Federal Court's decision of *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577; [1995] 2 CLJ 23 and the Court of Appeal's decisions in *Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd* [2007] 4 MLJ 209; [2007] 4 CLJ 109 and *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453; [2004] 3 CLJ 436, it was held that the parties' intention was discerned by the 'meaning of the words they have used'. Parties must have 'intended to say that which they have said'.

[163] In that tenth letter of offer, the plaintiff had expressly 'approved' the first defendant's request for the 'substitution of guarantors'. It is my judgment that this approval cannot be a meaningless decision of the plaintiff giving no benefit to the defendants who had requested for the substitution in the first place. The contents of the letter of offer clearly and plainly show that the parties intended and had agreed that there be a substitution of the guarantors. The court therefore ought to give effect to the intention of the parties as manifested in the words used in these letters identified.

[164] But, this substitution did not reduce the number of guarantors nor were the existing four guarantors discharged. All that the substitution achieved was to bring in an additional guarantor, namely the seventh defendant. With the 'new guarantee' now superseding the 'existing guarantee dated April 3, 1996', it meant that the terms in this fifth guarantee were to apply.

[165] This substitution of guarantors occurred a second time. in the 11th and 12th letters of offer and the seventh facility agreement providing for the seventh facility, the plaintiff said that:

> We have also approved your request for additional banking facility and substitution of guarantors. The revised terms and conditions of our offer …

[166] Once again, new/additional security was required. Specifically, at (v), the plaintiff required that a new joint and several guarantee of the following directors/person in their personal capacities for RM6,950,000 be furnished:

(a) Chong Yok Kewong

(b) Lee Chak Yin

(c) Wong Hon Sum

(d) Mohamed Mushaini bin Jeram

(e) Dato' Hj Abdul Hamid bin Hj Muhammad Zainuddin

(f) Loong Hooi Hin

(This new guarantee shall supersede the existing guarantee dated 29/10/2001)

[167] With this new guarantee, the substitution of guarantors took the form of an addition as well as a replacement of an existing guarantor. The third defendant was replaced by Ahmad Zabri bin Ibrahim and Loong Hooi Hin, the eighth and nineth defendants.

[168] Finally, in the 13th letter of offer, pursuant to the first defendant's request, the plaintiff once more agreed to vary the terms of the offer, revise the drawing limit of the overdraft and cancelled the bank guarantee. This last letter of guarantee and indemnity is dated 5 June 2002. It supposedly supersedes the earlier. The guarantors here are the same as those in the previous guarantee, namely:

(a) Chong Yok Kewong

(b) Lee Chak Yin

(c) Wong Hon Sum

(d) Mohamed Mushaini bin Jeram

(e) Ahmad Zabri bin Ibrahim

(f) Loong Hooi Hin

[169] The question that now arises is whether with the substitutions, were the earlier guarantors, discharged? The third defendant claims that he was.

[170] In his testimony, the third defendant (DW3) informed the court that he should not be sued because of this substitution. In his evidence-in-chief, he said:

> I am resisting the Plaintiff's claim because it is based on three RHB overdraft accounts as mentioned in paragraph 37 of the Statement of Claim (English translation) found at page 81 of the Bundle of Pleadings. The Plaintiff has based its claim on facilities granted by two Banks namely D&C Bank and Bank Utama. I was substituted as a guarantor for the 1st Defendant by the Plaintiff. As such, the Plaintiff's claim against me is flawed as the Plaintiff is trying to make me responsible as a guarantor for the RHB facilities. The Plaintiff's claim should be dismissed, as I am no longer liable for the facilities granted by the RHB Bank.

[171] Other than this piece of evidence, this witness was not really helpful in the other matters under consideration. He could not remember when he became a director or the details of the projects or facilities that he helped secure, this is understandable given his age and his limited involvement in the active running of the first defendant at the material time. But that does not change the position of his liability in law as a guarantor.

[172] This issue of discharge of guarantors was one of the issues considered in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239 at p 433 (MLJ); p 248 (CLJ), the Supreme Court agreed with the trial court's findings that there was no discharge in the facts of the case. The Supreme Court refused to find or infer that with the substitution of guarantors following a change in the board of directors in the borrower company, the parties had also discharged the earlier guarantor. Aside from the oral testimony of the bank officer, the Supreme Court examined the provisions of the guarantee and concluded that there was no discharge. It was the view of the Supreme Court that the liability of the previous guarantor was preserved even with the substitution.

[173] The Supreme Court further took pains to determine the issue by examining a close analogy in the case of *Mahoney v McManus* (1981) 36 ALR 545; (1981) 55 ALJR 673 where Gibbs CJ said:

> If all the parties to both guarantees had been the same, it would have been easy to reach the conclusion that they had intended, not that there should be two identical guarantees in respect of the same existing indebtedness, but that the latter guarantee was to be taken in substitution for, and to discharge, the former.

[174] In applying the dicta, the Supreme Court did not find those conditions or similarities present in the case before the court:

> Such a situation does not obtain in the present case. The guarantors for the first guarantee and the guarantors for the second guarantee cannot be said in the strict sense of the word 'identical' to enable us to decide by implication that the second guarantee is in fact given in substitution for, and to discharge, the former. The amount guaranteed under the first guarantee was also different from that in the second guarantee where the terms of repayment of the term loans themselves are different. Besides, the second guarantee could only take the effect if the monies under the term loans were released but the evidence shows that no monies had been released thereunder. More importantly, there is no evidence for us to hold that it was intended by the appellant that the first be replaced by the second guarantee and that the guarantor be discharged. On the contrary, we are satisfied on evidence that it was the intention of the respondent that the first and second guarantee should subsist side by side and not one in substitution for another, with all apparent consequences following. Neither can we imply from the giving of the second guarantee per se such intention. On the other hand we are of the view that the rest of Gibbs CJ's dictum in the passage, quoted above is applicable to the facts obtaining in the present case.

[175] In our present facts, the substitutions involved different parties. Although the guarantees have identical terms, there are still material differences, certainly in the amounts or indebtedness now guaranteed. More importantly, and as found in both *Lee Ah Chor* and *Mahoney v McManus*, there is no evidence here that both parties intended that with the substitutions, the previous guarantors were to be discharged. I cannot find any express intention or words that will direct or allow the court to draw that inference.

[176] On the contrary, the evidence reveals that the parties had always intended the guarantees to subsist alongside each other with no consequential effect other than a substitution from that new guarantee. This is regardless of the use of the term 'supersede'. This term means no more than what it says and that is to take the place of the earlier guarantee. It does not and cannot amount to a discharge of the defendants from their obligations under the earlier guarantees. Those obligations remain and subsist alongside the new ones created under the fresh arrangements. To construe otherwise will amount to rewriting the terms of the contracts. That is never the role or function of the court. The court can only give effect to the clear intentions of the parties as evinced by the terms and conditions of these documents before me.

[177] I must add that my earlier findings and determination in respect of the seventh defendant holds equally for the eighth and ninth defendants who were the additional guarantors brought in subsequently. Both these defendants did not testify but chose to offer their case through the seventh defendant. I did not hear any separate or distinct evidence from the seventh defendant in respect of these defendants, I can only conclude that their case and reasons are as pleaded.

[178] The upshot of this is that the second, third, fourth and fifth defendants

A are liable for the sum due under the DCB Bank facilities as reflected in the first two accounts, that is, a sum of RM1,354,378.30 together with interest as pleaded. Other than the third defendant, these defendants together with the seventh, eighth and nineth defendants are liable for the sum due under the Bank Utama facilities as reflected in the third account, that is RM2,266,456.55 B together with interest as pleaded. Insofar as the third defendant is concerned, he is also liable for the sum due under the Bank Utama facilities as reflected in the third account, that is RM2,266,456.55 together with interest as pleaded; but up to the limit as stipulated in the fifth guarantee (RM5,145,000).

C CONCLUSION

[179] From the submissions made and from a totality of the evidence led, I am amply satisfied that the plaintiff has proved its claim against all the defendants here.

D

[180] In the statement of claim, the plaintiff claims the principal sum of RM3,620,834.85. The defendants have suggested that the claim ought to be dismissed because the court cannot be expected to sort out the portion that is to be borne by which defendant.

E

[181] With the greatest respect, I must disagree. The whole statement of claim must be considered, not just the particular paragraph pointed out by the defendants. From a proper reading of the statement of claim, it can be seen that F the plaintiff's claim is for the total sum as pleaded at para 37 with the details as found in the earlier paragraphs. It is possible to discern which of the claims which relate to which of the two banks.

[182] Accordingly, I make the following orders:

G

(a) the first defendant is liable to the plaintiff for the full sum of RM3,620,834.85 together with interests as pleaded at prayers 1,2,3 and 4 of the statement of claim (see pp 94–95 of the bundle of pleadings);

(b) the second, third, fourth and fifth defendants are liable for the sum due H under the DCB Bank facilities as reflected in the first two accounts, that is, a sum of RM1,354,378.30 together with interest as pleaded (see pp 94–95 of the bundle of pleadings);

(c) the second, fourth, fifth, seventh, eighth and nineth defendants are liable I for the sums due under the Bank Utama facilities as reflected in the third account, that is RM2,266,456.55 together with interest as pleaded (see pp 94–95 of the bundle of pleadings);

(d) the third defendant is also liable for the sums due under the Bank Utama facilities as reflected in the third account, that is RM2,266,456.55

together with interest as pleaded; but up to the limit as stipulated in the fifth guarantee (see pp 94–95 of the bundle of pleadings); and

(e) costs of RM40,000 to be borne jointly and severally by the defendants.

Plaintiff's claim allowed.

Reported by Ibnu Aswan